

Facing the Music through Environmental Administrative Penalties: Lessons to be Learned from the Implementation and Impact of Section 24G?

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Abstract

Section 24G was inserted into the National Environmental Management Act 107 of 1998 to provide a mechanism for authorising activities that commence unlawfully. It contains South Africa's only environmental administrative fine - and a quasi one at that. The section has spawned much debate and controversy, including the fact that its existence and purported abuse undermine the fundamental objectives of environmental impact assessments - a cornerstone of government's legislative and decision-making response to the environmental right. This article presents certain results of the first part of an empirical study which explored the criticisms of section 24G; the extent to which it has a deterrent effect, and the lessons that can be learned in designing an administrative penalty system. Approximately 400 people, including representatives from government, the regulated community and environmental consultants were interviewed or surveyed. The results yielded several observations. This article focuses on the extent to which the section is used and the degree of awareness and knowledge about section 24G. The second part of the study probes the deterrent effect of section 24G in more depth by considering the influence that experience – either own or other's – has had on the regulated community.

Keywords

Environmental right; section 24G; administrative penalties.

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1 Introduction

When the environmental right was enshrined in section 24 of the Constitution of the Republic of South Africa, 1996 it signalled that the environmental injustice that prevailed under apartheid would no longer be tolerated. Apart from affording everyone an individual right to an environment that is not harmful to their health or well-being,¹ it also requires government to take active measures to secure the realisation of the right by passing legislation.² National government has initiated numerous projects to discharge this mandate, including a policy and law reform project which has been ongoing since 1995. In the beginning the project involved a substantial undertaking as existing environmental legislation was approximately twenty years behind that of developed countries and did not reflect the rights-based approach required by the Constitution.³ In many respects the law reform process has resulted in significant achievements. South Africa now has a comprehensive environmental legislative framework that reflects principles and authorisation requirements, such as environmental impact assessments (EIA), that are rights-orientated and aligned with international law. However, legislation alone does not achieve environmental objectives. As the recently published United Nations Environment Programme notes in its *Environmental Rule of Law: First Global Assessment Report*:

If human society is to stay within the bounds of critical ecological thresholds, it is imperative that environmental laws are widely understood, respected, and enforced and the benefits of environmental protection are enjoyed by people and the planet.⁴

The environmental law reform project will continue for many years as government responds to new regulatory needs and makes refinements to address the unexpected consequences which emerge in the wake of promulgated legislation. This is an important undertaking. However, it is

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¹ Section 24(a).

² Section 24(b).

³ Steyn 1999 *New Contree* 7.

⁴ UNEP *Environmental Rule of Law* vii.

equally important that the impact of existing mechanisms be considered so that future legislation is optimal.

The *National Compliance Monitoring and Enforcement Strategy*, 2014 recommended that the feasibility of introducing an administrative penalty system for environmental offences be explored.⁵ Some who have called for their introduction will welcome this.⁶ It would also follow trends in several countries that have opted to expand their approach to enforcement by introducing such regimes.⁷ There are, potentially, several advantages that could be achieved. But there are also unknowns such as whether administrative penalties will result in people viewing environmental offences less seriously – an issue that government has made strenuous attempts to overcome.⁸ A decision to introduce an administrative penalty system, or not, therefore ought to be informed by research so that underlying the environmental objectives are not unintentionally undermined.

The national Department of Environmental Affairs (DEA) (as it was then) initiated a research project in line with the recommendation in the strategy.⁹ To contribute to that research, the author volunteered to undertake an exploratory empirical study on experiences in implementing South Africa's first, and currently only, administrative fining mechanism in environmental legislation, namely, section 24G of the National Environmental Management Act 107 of 1998 (NEMA).¹⁰ The section has attracted controversy, criticism and interpretative debates since its promulgation and the fine is not a true administrative one.¹¹ Nevertheless, the fines that are imposed in terms of section 24G are the sole source of the environmental departments' experience with using an administrative penalty. Because of this, one can

⁵ The strategy is not in the public domain. The author has access to the document as project manager and lead drafter of the strategy.

⁶ See, for example, Kohn 2012 *SAJELP*; Fourie 2009 *SAJELP*; and Hugo 2014 *Administrative Penalties*.

⁷ Countries which use administrative penalties for environmental offences include the Netherlands, Germany, the United Kingdom, Russia, Belarus and Georgia. Regarding potential benefits, see Faure and Svatikova 2012 *Journal of Environmental Law* 253 who argue that it is cost effective to "complement criminal law enforcement by administrative law rather than to allow for a single (criminal) sanctioning instrument".

⁸ One way in which it has done this is by increasing the maximum penalties for environmental offences. See Šugman Stubbs and Hall 2021 "Merging Criminal and Administrative Law" 107-136 for a discussion on the challenges of defining a clear boundary between criminal and administrative processes.

⁹ DEA is now called the Department of Forestry, Fisheries and Environment.

¹⁰ The wording of s 24G is replicated in s 22A of the National Environmental Management: Air Quality Act 39 of 2004 (Air Quality Act). Whilst there are now technically two fining mechanisms, because s 22A replicates s 24G they are essentially the same mechanism. The study was conducted over approximately a year during 2016 and 2017.

¹¹ See section 3 below.

arguably use section 24G as a proxy indicator for exploring people's perceptions and responses to administrative fines for environmental offences. In addition, the research provided an opportunity to examine the extent to which certain criticisms of the section regarding its abuse and lack of deterrence are justified.

The response to the study yielded much information which can be used to draw insights about the nature of section 24G in practice and to inform the design of administrative penalties. This article presents the first part of the results. It examines the extent to which section 24G is used and the degree of awareness and knowledge about section 24G, the latter being a self-evident but necessary precursor for the section to have an impact. The second part will probe the deterrence effect of section 24G further by considering the influence that experience – either own or other's – has had on the regulated sector.

2 The origins of section 24G

The law reform project began with a policy process – the Consultative National Environmental Policy Process (CONNEPP). CONNEPP aimed to solicit the public's views in charting a new, rights-based approach to environmental management which could inform law reform and approaches to the public administration of the environment. While the policy development process was unfolding, passing legislation on the requirements of EIAs for identified activities that have a negative effect on the environment became a political priority. The Minister passed the first EIA Regulations (the ECA Regulations) and a Notice setting out a list of activities¹² in 1997 in terms of the existing Environment Conservation Act 73 of 1989 (ECA) with the intention of 'transferring' them to NEMA when it was promulgated.¹³

ECA and the Regulations required any person who intended undertaking a listed activity to conduct an EIA and to obtain authorisation before undertaking that activity. Many considered the Regulations to be a watershed in South African environmental legislation. For the first time, legislation required the potential environmental impacts of development activities to be considered proactively and addressed before they eventuated - either by refusing the application or by imposing mitigation measures to manage the impacts as conditions of authorisation. They also provided the basis for decisions on these applications to incorporate social and environmental justice as a public participation process had to be conducted as part of the EIA in which the public could express their views

¹² GNR 1182, 1183 and 1184 in GG 18261 of 5 September 1997.

¹³ The framework was provided in sections 21 and 22 of ECA. The transitional nature of these Regulations was made clear by s 50(2) of NEMA.

on a proposed development. The Regulations accordingly represented a significant shift away from past decision-making approaches. They provided a powerful environmental management tool that still lies at the heart of the government's legislative response to the environmental right today. Although the Regulations have been repealed and succeeded by different sets of EIA Regulations and Notices listing activities passed in terms of NEMA, the requirements to obtain authorisation before commencing a listed activity and to offer the public an opportunity to participate have remained central to all of them.¹⁴ Because EIAs are a cornerstone of the regulatory response to the environmental right this legislation should be jealously guarded, and efforts to dilute or abuse it resisted.

Notwithstanding this, the ECA Regulations resulted in a conundrum where activities commenced in contravention of the requirement to obtain authorisation proactively. In these situations, prosecution was available to punish the transgressor. However, even if criminal penalties ensued, the activity remained illegal. Often transgressors wanted to continue the activity, but to do so they needed to regularise the activity and bring it into compliance with the legislation i.e. they needed authorisation to be granted *ex post facto*.

When confronted with these cases the environmental departments were required to make one of two decisions. On the one hand, they had to decide whether it would be desirable to grant *ex post facto* authorisation under any circumstances or whether that approach could itself stimulate non-compliance. In this regard, there was a risk that opening the door to *ex post facto* authorisation would lead to people opportunistically undertaking a listed activity and adopting a 'start now and say sorry later' approach. Such an approach potentially provided the regulated community with several advantages. It could avoid delays in getting an activity operationalised; mitigation measures implemented by the developer might be considered as being *fait accompli* and for permission might be virtually guaranteed as a department would find it hard to justify a decision to deny authorisation and require a development to be demolished after the developer had made extensive financial investment and the impacts already incurred. Granting *ex post facto* authorisation therefore had the potential to undermine the objectives of the EIA Regulations and the environmental right.

On the other hand, apart from policy considerations, the departments also had to assess whether it was legally possible to grant authorisation. As noted above, the primary regulatory objective of the EIA regime is ensuring

¹⁴ These Regulations and associated listing notices were passed in 2006, 2010 and 2014. See GNR 385, 386 and 387 in GG 28753 of 21 April 2006; GNR 543, 544, 555 and 546 in GG 33306 of 18 June 2010; and GNR 982, 983, 984 and 985 in GG 38282 of 4 December 2014.

that impacts are considered before they occur. Allowing *ex post facto* authorisations therefore not only legitimised neglecting the hard-fought for right of the public to participate in decisions that affected their environment proactively, but it would trammel on the legislative objective of being pre-emptive insofar as the management of impacts is concerned. This would be particularly problematic in instances where significant and irreversible impacts occurred. In addition, ECA did not contain any wording which expressly provided for granting authorisation *ex post facto*, although an argument could be made that common law powers did.

The lack of certainty regarding the legal position resulted in litigation and two judgments in 2002 and 2003. In the first - *Silvermine Valley Coalition v Sybrand Van Der Spuy Boerdery* - the Western Cape High Court stated unequivocally that the EIA legislative structure was designed to be a proactive regulatory mechanism and could not be relied on as a basis for granting *ex post facto* authorisation.¹⁵ By contrast, in the second judgment - *Eagles Landing Body Corporate v Molewa* - the Transvaal Provincial Division accepted that *ex post facto* authorisation was possible in certain circumstances.¹⁶ These judgments did not provide the certainty required to facilitate a consistent approach between the environmental departments. NEMA was amended in 2004 by the National Environmental Amendment Act 8 of 2004 (Act 8 of 2004) to provide this certainty.¹⁷ The amendments included the insertion of sections 24F and 24G.¹⁸ Section 24F made it an offence to commence a listed activity without authorisation. Section 24G provided that a person who commenced an activity in contravention of section 24F could apply for "rectification".¹⁹ In summary, the rectification process involved four key steps, namely: (i) an application for authorisation; (ii) an instruction by the authority to the applicant requiring them to undertake an EIA and the undertaking of the EIA; (iii) the mandatory payment of an "administration fine" of up to R1 million before the authorities considered the application; and (iv) a decision by the authority to grant

¹⁵ 2002 (1) SA 478 (C).

¹⁶ 2003 (1) SA 412 (T).

¹⁷ The Act commenced on 5 January 2005.

¹⁸ Section 3 of the Act.

¹⁹ The heading of the section was "Rectification of unlawful commencement or continuation of activities". It was controversial as the intention of s 24G was never to rectify unlawful conduct retrospectively, but to make it lawful - if authorisation was granted - from the date of authorisation onwards. The heading was amended by the National Environmental Management Laws Second Amendment Act 30 of 2013 (Act 30 of 2013) to "Consequences of unlawful commencement of listed activities".

authorisation or to instruct the applicant to cease the activity and rehabilitate the environment.²⁰

The application of section 24G has changed over the years. Initially, it was primarily intended to be available for contraventions of the forthcoming NEMA EIA Regulations. However, there was a transitional amnesty period for transgressions that occurred in terms of the ECA Regulations for six months after commencement of the amendment Act, i.e. until 5 July 2005.²¹ In 2008, this transitional provision was amended by removing the time restriction which means developers can still address ECA-related transgressions in terms of section 24G.²² In addition, in 2013 the section was extended to transgressions regarding waste management activities listed in terms of the National Environmental Management: Waste Act 59 of 2008 (Waste Act).²³

3 Controversy, criticisms and the status quo

The promulgation of section 24G laid to rest the question of whether *ex post facto* authorisation is legally possible. The section provides a process that can be used to resolve the practical consequences of non-compliance – either by bringing them within the scope of the regulatory net through authorisation and the imposition of appropriate conditions to manage environmental impacts or by refusing to grant authorisation with the option of requiring rehabilitation. Notwithstanding this, concerns raised early in the discussions about *ex post facto* authorisations regarding the potential for unintended consequences continued. The use and implementation of section 24G still spawns debate and controversy.²⁴ Key amongst these are views about the abuse of the section 24G process as an alternate form of application and its lack of deterrence effect.

²⁰ The Minister or MECs have the power to administer the section. These powers are delegated to the environmental departments and for convenience the decision-maker is therefore referred to as ‘the authority’ or ‘the department’.

²¹ Section 7 of Act 8 of 2004.

²² Section 12(3) of National Environmental Amendment Act 62 of 2008 (Act 62 of 2008).

²³ Section 9 of Act 30 of 2013.

²⁴ The section has also featured in several court actions. Apart from those mentioned elsewhere in this article see, for example, *Magaliesberg Protection Association v MEC, Department of Agriculture, Conservation, Environment and Rural Development, North- West Provincial Government* (1776/2010) [2011] ZANWHC 67 (15 December 2011); *The Body Corporate of Dolphin Cove v Kwadukuza Municipality* (8513/10) [2012] ZAKZDHC 13 (20 February 2012); *Supersize Investments 11 CC v The MEC of Economic Development* (70853/2011) [2013] ZAGPPHC 98 (11 April 2013); *Pretoria Timber Treeters CC v Mosunkuto NO* (53710/2008) (2009) ZAGPPHC 326 (22 September 2009).

Regarding the former, critics anticipated that section 24G would provide an opportunity for abuse as an elective deviation from the routine application approach of proactively assessing activities and that transgressors would view it as an alternate, more effective route to virtually guaranteed authorisation. This view is illustrated by Paschke and Glazewski who state that:

As it stands, section 24G offers a person contemplating the undertaking of a listed activity an election: they may follow the "normal route" of seeking environmental authorisation before commencing the activity or alternatively, if the perceived benefits outweigh the perceived costs, they can undertake the activity and seek to obtain authorisation *ex post facto*.²⁵

The Centre for Environmental Rights (CER), which has been vocal in raising its view that developers abuse section 24G, believes these concerns have been realised. In one submission to DEA in 2011, CER summarises comments which it collected from stakeholders as including the following problems:

4. the phenomenon of repeat offenders, and the need for a register of offenders, particularly to capture violators who commit s.24F offences in different provinces;
5. a perception that s.24G applications always end in authorisations being granted...²⁶

CER also believes that section 24G undermines deterrence. In the same letter referred to above, the summary of comments notes the following:

- 1.1 administrative and criminal fines that are too low to constitute a proper disincentive for non-compliance. There also seems to be a tendency for fines to be reduced on appeal. There is also general concern about a lack of transparency in the calculation of fines, giving rise to concerns about corruption;
- 1.2 the cynical abuse of s.24G whereby companies simply budget for the administrative fine and then proceed with contraventions of s.24F (and do not stop when caught out). There also seems to be a trend to rely on the emergency defence in s.24F(3) to criminal liability, followed by a s.24G application ...²⁷

²⁵ Paschke and Glazewski 2006 *PER* 144. See also Kohn 2012 *SAJELP*.

²⁶ CER 2011 <https://cer.org.za/wp-content/uploads/2011/08/CER-Submission-on-S24G-May-2011.pdf>.

²⁷ CER 2011 <https://cer.org.za/wp-content/uploads/2011/08/CER-Submission-on-S24G-May-2011.pdf>.

The deterrence consideration is also an issue when considering the interplay between the nature of the fine and criminal enforcement. Initially, the fine was intended to be an administration fee that would deter people from regarding the section 24G process as a feasible alternative to the routine application process. It was not meant to exclude prosecution.²⁸ However, in some jurisdictions, prosecutors were reluctant to prosecute on the basis that it would violate the *ne bis in idem* principle.²⁹

Government itself has echoed some of these concerns in its motivations to amend the section twice, with a third amendment currently being proposed.³⁰ In the explanatory memorandum which accompanied the 2013 amendments, it states that:

Over the years, a trend in the abuse of the section 24G environmental authorisation process has been noticed. Many people tend to knowingly commence with a listed activity without an environmental authorisation and later apply for a section 24G environmental authorisation to rectify the unlawful commencement. These challenges, amongst others, pose serious dangers to the credibility of the environmental impact assessment process. Therefore, in an effort to deal with the challenges, more stringent provisions have been introduced.

This Portfolio Committee on Water and Environmental Affairs accepted this position and stated in its report on the amendments that -

7. Clause 9 makes substantive amendments to section 24G of the Act, to address the numerous complaints received from the public that ... competent authorities have experienced a reluctance from the National Prosecution Authority to institute prosecution once a person applied for or has been granted an environmental authorization, retrospectively, in terms of section 24G.³¹

Certain of the amendments are significant for current purposes. The 'administration fine' is now called an 'administrative fine' and the maximum amount has increased from R1 million to R5 million in 2013.³² The change in name and increase to match the maximum criminal penalty for the offence of commencing a list activity without authorisation at the time means that

²⁸ Personal knowledge from discussions with government officials at the time.

²⁹ Portfolio Committee on Water and Environmental Affairs 2013 <https://sabinet.co.za>.

³⁰ Section 6 of Act 62 of 2008 and s 9 of the Act 30 of 2013. The current National Environmental Management Amendment Bill [B14D-2017] proposes additional amendments which will entitle a successor or person in control of land to make a s24G application. At the time of writing the Bill has been approved and is due to be signed by the President.

³¹ Portfolio Committee on Water and Environmental Affairs 2013 <https://sabinet.co.za>.

³² Section 6 of Act 62 of 2008 and s 9 of Act 30 of 2013 respectively.

the fine has acquired a more punitive character.³³ In support of this is the "calculator" which government uses to determine the fine. For several years the calculator was not publicly available. However, in the *Regulations Relating to the Procedure to be Followed and Criteria to be Considered When Determining an Appropriate Fine in terms of Section 24G* which were passed in 2017, the factors which must be taken into account in calculating a fine are contained in regulation 4 and the applicant is given an opportunity to make representations to the fine committee established in terms of the Regulations on those factors.³⁴ Some of these factors talk directly to the seriousness of the contravention and the applicant's conduct because the committee must consider the impact of the activity and the applicant's compliance history. In addition, regulation 9 requires that where the applicant is a repeat offender the maximum fine must be recommended by the fine committee.

A fine paid in terms of section 24G is nevertheless not a true administrative fine. This is because the transgressor initiates the process and the relevant government department cannot trigger the process and initiate proceedings itself to assess the nature of the unlawful conduct, its impact or what the punitive consequences should be. In other words, it is not an enforcement tool that environmental departments can use without the transgressor initiating the process by making an application. Related to this is that, unlike a true administrative penalty, the applicant pays the fine in anticipation of getting a benefit i.e. obtaining authorisation to bring the illegality to an end.

Hugo points out that the stage at which the fine is determined and must be paid is also relevant.³⁵ She indicates that the fine must be paid before the EIA reports are considered by the authority.³⁶ She is correct that this was the position when section 24G was inserted into NEMA. It changed, however, with the 2008 amendment as subsection (2A) requires the fine to be paid before the authority exercised their powers in terms of subsection 2(a) or (b) i.e. the decision to direct the applicant to cease the activity and rehabilitate the environment or to grant authorisation. In other words, the change in wording required the payment of the fine before a decision was made, but not necessarily before the reports were considered. Nevertheless, for a time this created a duality in the nature of the fine as on the one hand it was determined without reference to the EIA and associated specialist reports regarding the impact of the illegal activity but, on the other hand, the calculator includes considerations that suggest that

³³ Section 25 of Act 30 of 2013 increased the monetary penalty for the s 24F offence to a maximum of R10 million.

³⁴ GNR 698 in GG 40994 of 20 July 2017. Annexure A provides the form for making representations.

³⁵ See Hugo 2014 *Administrative Penalties* 58.

³⁶ Section 24G(4).

environmental impacts and the specific characteristics surrounding the application are relevant in the determination of the fine.³⁷

The other relevant amendment aims to enhance the deterrent effect of the section. In this regard, the 2013 amendment inserted a new subsection (6) which makes it clear that there is a right to pursue criminal enforcement where an application has been made in terms of section 24G.³⁸ Transgressors therefore potentially face an administrative fine of up to R5 million as well as a criminal sanction of up to R10 million and / or 10 years imprisonment. Furthermore, subsection (6) is complemented by a new subsection (7) which empowers the authority to defer a decision on an application while the activity is under investigation or being prosecuted until those proceedings have been finalised. Together these provisions are intended to go some way towards diluting perceptions that the section 24G process can be budgeted for and will save time.³⁹

4 Methodology

There is no generally accepted methodology for researching the impact of legislation. Some opt for positivist approaches, others for interpretive approaches. Both have strengths and weaknesses. A discussion of these is beyond the scope of this article. Suffice it to say that the approach to this research draws on elements of both methods.⁴⁰ It involved collecting quantitative information, where possible, and qualitative information to understand the empirical experiences of people in the context of ten putative indicators.

4.1 Review of quantitative information

Attempts were made to obtain quantitative information from published government reports as well as internal departmental records. It was anticipated that this information could be used to evaluate the accuracy of stakeholders' and officials' perceptions on certain issues. Although some of

³⁷ See also, *Plotz N.O. v Member of the Executive Council for Local Government, Environmental Affairs and Development Planning, Western Cape and Others* Case no: 12736/2014, WCD, 20 May 2016, unreported para 91.3 where the court held that:

The nature of the administrative fine, provided for under s 24G, is not a typical administrative penalty, inasmuch as the fine is determined before the authority evaluates the information. It is not strictly punitive since payment simply prompts consideration of the application for rectification. [Footnotes omitted].

³⁸ Subsection 6 states that and a section 24G application does not derogate from the power to investigate or prosecute a transgression.

³⁹ The private prosecution in *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* (CC82/2017) [2019] ZAGPPHC 86 (Uzani) may send a further signal that the courts are willing to entertain prosecutions.

⁴⁰ See Hall 2013 *SA Public Law* 58 for a discussion on approaches to impact studies.

this information was made available, how data is gathered and recorded by the departments differs. This rendered it difficult to assess some of the indicators fully.

4.2 Surveys

Two surveys were developed - one for business and industry and another for environmental consultants who advise them.⁴¹ The questions in the surveys mirrored each other, although some were changed to accommodate the different exposures or roles of the sector. Both surveys were uploaded to a web-based survey platform and the tracking of IP addresses was disabled to ensure the anonymity of the responses. Given the nature of the sectors, no disadvantage due to literacy or technology constraints was anticipated. E-mails were sent to representative organisations of the two sectors with an explanation of the purpose of the survey and a request to distribute the web link to their members. Additional e-mails were also sent to a limited number of individuals in both sectors. To facilitate as random a response as possible, the e-mails encouraged recipients to distribute the e-mail to relevant candidates in their networks.

When the surveys closed, 129 people had participated in the business survey (business survey). The respondents represented a diverse range of sectors, these being:

- industry (13.18 per cent)
- manufacturing (22.48 per cent)
- mining (16.28 per cent)
- construction/ development (5.43 per cent)
- agriculture (24.81 per cent)
- other (17.83 per cent).

Respondents who selected the "other" option indicated that they worked in the following sectors: foundries (1); local government (1); renewable energy project development (1); oil and petroleum (2); tourism (1); quarries (1) and finance (2). Twelve respondents indicated that they were not from the business sector and were accordingly excluded from the analysis. The total number of responses analysed in the business survey was 117.

Apart from the range of sectors, the respondents also represented organisations of different sizes. In response to the question: "*How many people does your organisation employ?*", approximately 37 per cent indicated less than 50 employees and 31 per cent more than 500. The

⁴¹ For convenience these are jointly referred to as "business".

remaining categories of 51 to 100 and 101 to 500 constituted approximately 15 and 18 per cent of respondents respectively.

In the consultant's survey two disqualification questions were included to ensure that only responses from consultants involved in environmental application processes were considered. Of the 300 people who responded, 45 were disqualified after question 2. A further person was excluded because they did not answer question 3 that was coded as a mandatory response which meant that the respondent had not answered any questions other than the first two. The total number of respondents considered in the analysis of the consultant's survey was accordingly 254.

These respondents indicated that they work across the business sectors as indicated in Table 1 below. (Respondents were able to select more than one category).

Table 1: Sectors that consultant respondents are involved in

Answer options	Response by per centage	Number of respondents
Industry	65.35%	166
Manufacturing	36.61%	93
Mining	53.94%	137
Construction/ development	81.10%	206
Agriculture	40.16%	102
Total no. of respondents		254

4.3 Interviews

Besides the surveys, eight focus group sessions were held with officials to obtain insights into the government's experience. These were conducted with DEA and seven provinces, namely, Free State; Gauteng; KwaZulu-Natal; Mpumalanga; North West; Northern Cape and the Western Cape. A semi-structured questionnaire was used to facilitate these sessions. Participants were also encouraged to raise issues they considered to be relevant. The sessions lasted between one to three hours.

4.4 Limitations of the study

Two limitations to the study are noted. The number of questions which can be asked in a survey is inherently limited. The questions asked in this study possibly exceeded what is generally acceptable. Nevertheless, this limitation means that some questions remained unasked.

The second limitation is that the views of civil society were not solicited. This was because the research focused on the extent to which section 24G has had a deterrent effect on the regulated sector through an examination of their and their advisors' views. An unexpected outcome of the research, however, was the extent of interest in the surveys, including by non-governmental organisations and members of the public. This suggests that there is scope for conducting further research on the section which gathers input from civil society and labour too.⁴²

5 The extent to which section 24G is used

At the outset of the project research was conducted on the number of applications that are made in terms of section 24G each year to set a quantitative baseline for the study. It was anticipated that this would provide a sense of the scale of non-compliant members of the regulated community who seek to legalise their activities. Challenges were encountered as the departments record data differently and data is not readily available for all departments. As an alternate, the National Environmental Compliance and Enforcement Reports (NECER) from 2011/12 to 2015/16 were reviewed to assess whether they could be used as a benchmark as all environmental departments have to provide their statistics on section 24G processes annually to compile these reports. The NECER statistics reflect the number of fines that have been paid as opposed to the number of applications which are made. However, since no backlogs were reported with the processing of section 24G applications, there ought to be a broad correlation between the number of fines that are imposed and the number of applications that are received each year. The consolidated numbers of fines paid during a five-year period are reflected in Table 2.

⁴² It was anticipated that a further limitation of the research would be that section 24G applications for transgressions of the Waste Act and section 22A applications in terms of the Air Quality Act would be excluded from the scope of the study. However, no distinction was made in the data and survey responses and it was not possible to exclude these applications.

Table 2: Number of fines paid

Institution	2011/12	2012/13	2013/14	2014/15	2015/16
DEA	10 ⁴³	5	6	4	5
Western Cape	42	42	3	62	49
KwaZulu-Natal	1	3	8	9	2
Gauteng	8	28	34	20	23
Limpopo	1	2	0	0	0
Eastern Cape	8	0	7	8	1
Free State	0	1	4	0	0
Mpumalanga	7	1	17	2	4
Northern Cape	1	6	0	0	0
North West	9	-	1	0	7
TOTAL	87	88	80	105	91

These statistics reveal several points. First, the total number of applications made each year ranges between 80 and 105. It is not possible to accurately estimate how these numbers compare to the number of routine EIA applications as data in respect of the latter also suffers from inaccuracies.⁴⁴ However, if two different datasets on EIA applications are considered, section 24G applications represent between 2.5 to 5 per cent of the number of routine applications. While these per centages do not indicate the scale of non-compliant activities as a whole, it does suggest that section 24G is not used prolifically.⁴⁵ Secondly, only two provinces regularly receive more than 10 applications a year - Gauteng and the Western Cape. These provinces are the biggest, and third biggest, economies in the country

⁴³ The report notes that these fines related to one development where DEA required separate applications for each listed activity that had commenced unlawfully.

⁴⁴ For example, DEA undated <https://www.environment.gov.za/sites/default/files/docs/publications/EIABooklet.pdf> reports the number of applications received, finalised and average applications received per year for the period August 2010 – March 2018 as being: 13 403 received; 12 285 finalised and an average of 1750 received per year, excluding applications which were made to the Department of Mineral Resources. By contrast Retief, Welman and Sandham 2011 *Southern African Geographical Journal* 154 report the average number of applications received in a year as being more than 5 000 under the ECA regime and 3 600 under the NEMA regime – figures which were obtained from DEA and which, because of the time period would also exclude mining applications.

⁴⁵ Whilst 100 per cent compliance is ideally the aspiration, many argue that total compliance is unrealistic. Regarding bureaucratic compliance to judgments, for example, Halliday describes total compliance as "a ludicrous notion of judicial review's potential influence." See Halliday 2004 *Judicial Review and Compliance* 16.

respectively. The environmental departments in both are allowed to retain the proceeds of the fines. Mpumalanga is the only other province that has, in one of the reporting periods, received more than ten applications in a year. This may indicate that there are no particular geographic hotspots for section 24G applications. Thirdly, there is a great degree of variability between the different institutions and often from year to year within institutions.

The numbers in the table above were also reviewed to examine whether any trends could be identified. A reduction in the number of annual applications could indicate that compliance rates have improved.⁴⁶ Officials from the different departments reported that the number of applications had reduced. However, when the results were charted, no downward trends were discernible and, except for 2014/15, the numbers are relatively consistent.

The extent to which these findings reflect the factual situation is open to question. First, some of the figures raise queries. For example, in 2013/14 the number of fines for the Western Cape is reported as being three. This is significantly less than the years preceding or following which suggests that the figure may be incorrect. In addition, in different reporting periods some departments reported zero fines. In the case of the Northern Cape, zero is reflected for three of the reporting periods. During the interview with the department approaches to section 24G and particular cases were discussed which suggests that the reporting of no fines in those reporting periods is incorrect. The reason for the 'zeros' in the table may therefore be that the departments provided no statistics as opposed to no fines being imposed. Secondly, access to section 24G application registers in two departments was provided. Both departments recorded applications in terms of calendar years as opposed to financial years. In one, the number of applications and fines imposed was higher than those reflected in the NECER.

Given these questions regarding the accuracy of the reported statistics it is not possible to be definitive about the number of applications that are submitted annually or any associated trends. It does, however, appear from the information that the number of applications is relatively small and a discernible downward trend is not likely.

6 Knowledge and awareness of section 24G

The entry point for the empirical analysis was understanding the extent to which the regulated community has an awareness of and knowledge about

⁴⁶ If a downward trend were observed other questions would need to be asked to establish whether the trend is attributable to increased compliance or other factors.

section 24G. It is self-evident that unless the regulated community is aware of the provision and understands its contents, it cannot have any impact or deterrent effect and attempts to explore more substantive indicators would be futile. The self-evident nature of this observation creates a danger of its significance being overlooked. Halliday is amongst a minority of researchers who have paid detailed attention to the implications of knowledge in assessing impact. His study provides many insights regarding the importance of understanding the actual knowledge that people have and the barriers to receiving it.⁴⁷

The need for the regulated community to know about legislative requirements is also implicit in the architecture of many environmental compliance and enforcement systems which reflect elements of the normative approach to compliance. In this regard, the normative theory of compliance is underpinned by a belief that people are motivated by appropriateness in their behaviour and that where they know about regulatory requirements they will comply unless they encounter obstacles in doing so.⁴⁸ This approach calls for compliance promotion to be a key component of the strategies which governments adopt to secure compliance so that knowledge is generated and barriers to compliance are removed. However, even if governments prefer an approach based more on rationalist theory, in which the regulated community is viewed as being compliant when it is in their interests to be so, knowledge is required to make those decisions.

6.1 Awareness and sources of information

Several questions were included in the surveys to understand if people know about section 24G and what they know. The first question aimed to establish if respondents knew about section 24G at all. It was phrased as follows:

⁴⁷ Halliday 2004 *Judicial Review and Compliance* 39–41 and Calvo, Platt and Sunkin 2007 <https://www.iser.essex.ac.uk/research/publications/working-papers/iser/2007-34> in the context of officials and judgments.

⁴⁸ INECE 2009 *Principles of Environmental Compliance and Enforcement* 8. Support for the normative theory is found in studies which show that compliance promotion tools have been used effectively to enhance compliance among small businesses and those who are unaware of legislative requirements. See Stafford, 2012 *Journal of Policy Analysis and Management* 533. Others such as Kotter 1996 *Leading Change* 9, 85-100 show that a lack of communication is a key reason why new approaches do not penetrate decision-making behaviour. There is not consensus that the normative theory encapsulates the motivations for compliant behaviour completely. Elements of the rationalist approach regarding deterrence are explored in Part II of this study.

Environmental authorisation must be obtained before an activity starts. However section 24G of the National Environmental Management Act, 1998 allows people who did not obtain an environmental authorisation when they should have to apply later. Have you heard about section 24G?⁴⁹

In the business survey, more than three-quarters of the 81 respondents - 77.9 per cent - indicated that they had heard about section 24G. There is a potentially positive aspect to this statistic as it indicates that a large majority of respondents are aware of the provision, the first step in creating a context for deterrence. Perhaps unsurprisingly because consultants are required advise clients on environmental legislative requirements, the number of consultants who responded affirmatively to this question was even higher - 95.26 per cent.

Respondents were then asked how they know about section 24G. Understanding the source of a respondent's awareness or knowledge is important. It can indicate much about the quality of information they receive and the potential accuracy and depth of their knowledge. In studies regarding the impact of the courts, Johnson and Canon suggest that the reception of information on judgments be viewed in the context of communication theory.⁵⁰ This can equally be applied to legislation. Whilst communication studies lack an overarching theory, conceptualising the reception of information on legislation as a process of transmission from message sender to message receiver provides a useful framework for gaining insights as to the reasons why people have the knowledge they do. If the transmission of information on legislation is considered in terms of a basic communication model, Parliament would be viewed as the message sender. Its messages reach the regulated community (message receivers) via different sources (channels of communication). Sometimes sources transform the message, as is the case with media reports which truncate the message. In other instances, where the information is received directly from the legislation, the message is transmitted largely intact. Where the regulated community obtains information from a source other than the original legislation, there is a potential for it to be diluted or even distorted.⁵¹

⁴⁹ The question was framed neutrally way so that it did not affect subsequent questions regarding whether respondents believe that the section 24G process can be used as a viable alternate to routine application process.

⁵⁰ Johnson and Canon 1999 *Judicial Policies* 204. The idea is not unique to them. See also Shapiro 2002 "Towards a Theory of *Stare Decisis*" and Wasby 1970 *The Impact of the United States Supreme Court* 83- 98, 251- 252.

⁵¹ A full assessment of the transmission of information and the potential barriers or enhancers fell beyond the scope of the study.

Respondents were accordingly offered several options and were allowed to select more than one, including an 'other' option which they were invited to explain. The results in the business survey are reflected in Table 3 below.

Table 3: Businesses' sources of information

Options	Responses
Media (newspaper articles, radio, TV news etc.)	7.32%
Our own internal processes	50.00%
A consultant that we employed	40.24%
Inspection by an environmental management inspector/ environmental department	23.17%
Course/ training	25.61%
Judgment by a court	2.44%
Other (please specify)	12.20%
Total respondents	82

Explanations for selecting the "other" option included the following: "previous experience as a consultant"; "information supplied by an industry institute"; "Department of Agriculture" and "scrutiny of the legislation".

In the consultant's survey the results were as follows –

Table 4: Consultants' sources of information

Options	Responses
Media (newspaper articles, radio, TV news etc.)	10.42%
Our own internal processes	73.33%
Inspection by an environmental management inspector/ environmental department	39.58%
Course/ training	40.42%
Judgment by a court	6.67%
Other (please specify)	33.33%
Total respondents	240

In this instance the additional sources mentioned in respect of the 'other' option included: "personal involvement in section 24G application processes"; "experience as an official"; "legal colleague"; "IAIAsa" (the consultants' representative body); "reading websites" and "personal involvement in law reform".

In both cases, internal processes were by far the main source of information, with inspections by environmental management inspectors (EMIs) and courses or training featuring second or third.⁵² The most prominent source of information is therefore an informal one which presents some risk of limited or inaccurate information being conveyed to the recipient. The next two most common sources are formal ones i.e. the information is obtained from someone who ought to have detailed accurate knowledge about the content of section 24G. There is, however, a possibility that this information may be given in a summarised form, as would be the case if an EMI mentions it during an inspection when detecting non-compliance.

One difference between the two responses is the extent to which the respondents read the legislation themselves - the most accurate source of information as it is the original 'message'. Only one person mentioned this in the business survey whereas 17 raised it expressly in the consultant's survey. This indicates that very few obtain their information from the original source and are highly dependent on less formal sources.

Formal government awareness programs were not mentioned in either survey. This is not surprising given the responses by officials when asked whether their department conducts any compliance promotion or awareness raising activities in respect of section 24G. Only one department indicated that they had run awareness raising campaigns. The lack of compliance promotion activities appears to be an active choice by some departments as they indicated that they did not want to incentivise non-compliant behaviour by proactively advising the regulated community of the existence of section 24G.

6.2 Knowledge regarding the quantum of the fine

Awareness of a legislative provision in itself cannot be used to establish a causal link to behaviour. Knowledge of the operational aspects of a section on the other hand may. Several questions were asked with a view to obtaining more nuanced information regarding knowledge. One of these asked respondents what they thought the maximum fine is as a significant underestimation or lack of knowledge about the quantum may – in the absence of other factors - signal that respondents are likely to take the provision less seriously. The question was also intended to examine views that section 24G has resulted in the perverse consequence of people budgeting for non-compliance.

It will be recalled that when section 24G was first inserted into NEMA the maximum fine was R1 million and this was subsequently increased to R5

⁵² The ranking of EMI inspections and courses were second and third respectively in the business survey and reversed in the consultants' survey.

million. Responses to the question could therefore be used to assess how much respondents know about the consequences of applying in terms of section 24G as well as their ability to keep their knowledge current. The results of the surveys are reflected in Table 5.

Table 5: Perceptions regarding the maximum quantum of section 24G fines

Options	Business responses (in percentages)	Consultant responses (in percentages)
Less than R100 000	23.75	8.05
Between R100 001 and R1 million	25	20.34
Between R1 million and R5 million	21.25	37.29
More than R5 million	8.75	19.07
Don't know	21.25	15.25
Total respondents		87

The responses show that only a limited number of business respondents know the correct answer i.e. 21.25 per cent. Consultants demonstrated a higher response i.e. 37.29 per cent. Even if the responses for the original maximum fine of R1 million are considered and added to the number of correct answers on the assumption that the knowledge is based on outdated information, it means that less than half of the business respondents have an understanding of the financial consequences that can follow when making an application and just over half of consultants know what the consequences of applying are. Given the limited number of respondents who overestimated the maximum fine, the results mean that a significant percentage of business respondents underestimate or do not know the amount of the fine that can be imposed. The degree of variability in the consultants' answers is a concern since in many instances they will be the advisors on whom business rely and it is therefore likely that they are 'distorting' the original message.

At first blush these results suggest that for most of the regulated sector the maximum fine that is set out in NEMA does not present a deterrent in practice. However, given the emphasis that many respondents placed on finances and financial implications in their comments on the survey, it was questioned whether the inaccuracy of knowledge was based on experience rather than the legislation or whether there was an additional dimension which required consideration. During the interviews with officials they indicated that fines which are imposed are seldom anywhere close to the current or previous maximum. To get a perspective on the quantum of the

finances that are imposed, the NECER were reviewed from 2011/12 to 2015/16. Because the reports provide consolidated statistics, there is no indication of the quantum of the fine imposed per individual application. Table 6 below sets out the total amount of fines collected by each department during a five year reporting period.

Table 6: Annual consolidated section 24G fine quantum

Institution	2011/12	2012/13	2013/14	2014/15	2015/16
DEA	11 028 000	2 228 500	5 931 000	4 194 000	1 695 000
Western Cape	1 275 675	3 495 975	3 495 975	4 515 125	3 520 000
KwaZulu-Natal	892 333	261 500	349 000	1 207 700	197 500
Gauteng	2 341 083	2 391 216	3 109 026	1 666 965	1 809 750
Limpopo	17 142	27 700	0	0	0
Eastern Cape	191 000	0	756 000	1 896 758	70 000
Free State	0	25 000	114 750	0	0
Mpumalanga	215 000	0	2 272 000	1 050 000	2 555 500
Northern Cape	0	0	0	0	0
North West	1 667 000	383 800	100 000	0	472 000

As an exercise in testing the average quantum of fines, the total number of fines collected were divided by the amount which was collected, both as reported in the NECER. The results of that exercise are reflected in Table 7.

Institution	2011/12	2012/13	2013/14	2014/15	2015/16
DEA	1 102 800	445 700	988 500	1 048 500	339 000
Western Cape	30 373	83 237	1 165 325	72 824	71 836
KwaZulu-Natal	892 333	87 166	436 996	134 188	98 750
Gauteng	292 635	85 400	91 441	83 348	78 684
Limpopo	17 142	13 850	0	0	0
Eastern Cape	23 875	0	108 000	237 094	70 000

Free State	0	25 000	28 687	0	0
Mpumalanga	30 714	0	133 647	525 000	638 875
Northern Cape	0	0	0	0	0
North West	185 222	-. ⁵³	100 000	0	67 428

Table 7: Average section 24G fine quantum

There are large variances between the different departments, but also from year to year within the departments. There are several other anomalies which suggest that the information may not be reliable. The average fine issued by DEA in 2011/12, for example, is more than the maximum permissible amount. In addition, in different reporting periods some departments report issuing no fines. As indicated in the discussion on the number of applications and because it is mandatory to impose a fine, the reason for the 'zeros' in the table may be that no statistics were provided by the department.

The author was also given access to the section 24G application registers of two departments. Although a review of the information confirmed that the maximum fine is rarely, if ever, imposed, it also showed large variations between the individual fines. Officials explained that there were several reasons for this including considerations regarding the environmental sensitivity of the area where the activity had commenced; the nature of the activity and the nature of the applicant. Other than deducing that most fines which are imposed are well below the maximum, in the absence of more comprehensive records, an average quantum of the fines that are imposed for the different types of activities at present cannot be established.⁵⁴

Apart from the statistics, to understand whether the fines have a deterrent effect, both surveys asked respondents how strongly they agreed or disagreed with the statement that the fines were affordable, reasonable and fair. The responses of the business survey and consultant's survey are set out respectively in the tables below.

Table 8: Business perceptions of the affordability, reasonableness and fairness of section 24G fines

	Strongly agree	Agree	Disagree	Strongly disagree	Don't know	No. of respondents
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⁵³ The average cannot be calculated because although an amount of R383 800.00 is recorded as being paid, the number of fines involved is not indicated.

⁵⁴ Officials in one province indicated that until 2014 there was a policy of not imposing the maximum fine. It does not seem that this policy was adopted throughout the country.

Affordable	5.41%	45.95%	13.51%	21.62%	13.51%	37
Reasonable	14.71%	29.41%	29.41%	11.76%	14.71%	34
Fair	12.50%	25.00%	34.38%	15.63%	12.50%	32

Table 9: Consultant perceptions of the affordability, reasonableness and fairness of section 24G fines

	Strongly agree	Agree	Disagree	Strongly disagree	Don't know	No. of respondents
Affordable	13.77%	43.71%	22.75%	8.98%	10.78%	167
Reasonable	5.81%	40.00%	34.19%	11.61%	8.39%	155
Fair	3.92%	45.10%	26.80%	15.03%	9.15%	153

Just over half of the business respondents felt that the fine was affordable, with 13.51 per cent not expressing a view because they had not yet received a fine in respect of their application. Those who disagreed constitute a significant minority. In the annotated responses, some of this disagreement related to the economic circumstances of the organisation. For example, one respondent mentioned that they were fined R1 million whereas their turnover per year is less than that. Another indicated that "the original fine would have put the company out of business" and that "the paying off of the fine has delayed the expansion of the company by three years". Also interesting is that some respondents indicated that no fine should be given at all -

"I am willing to step into line which we have done with our application, but don't fine me!"

"The economy is not doing well, we have short time on and off for numerous years now and are not doing as well as we once did. in difficult times it is really unfair and unjust to be giving us fines." (sic)

These responses show that even fines well below the maximum cause a sense of discomfort. They also suggest that the deterrence effect of the quantum of the fine is not uniform across the regulated community and that inaccuracy of knowledge regarding the maximum is not as significant as it may appear at first impression. Rather, the burden of the fine appears to be relative to the financial circumstances of the applicant. Some officials support this view. In one province officials noted that applications had been received by members of the community who had extremely limited financial means. The imposition of a fine of, for example, R10 000 on these applicants would be more burdensome and create more hardship than the maximum fine being imposed on a multinational whose profits are in the

multi millions or even billions. Apart from the implication that the deterrence effect of a fine is relative to the circumstances of the recipient, a further implication is that government should carefully consider the imposition of hefty fixed penalty fines in exploring the design of an administrative penalty system as it may result in social injustice.

The views expressed in the two quotations above that no fine should be imposed are also ones which should be considered. This is because they could be suggestive of an inadvertent consequence that the establishment of an administrative enforcement procedure creates a perception that the environmental crime is not a "real crime" in the same vein as those which are prosecuted. Such a view was directly expressed by one respondent who stated that:

When you operate a business, paying a fine is never affordable. However, when a mistake is made and that is the price of the mistake, it is preferable to pay a fine rather than be prosecuted.

Responses about the reasonableness and fairness of fines also generated some dissatisfaction. Regarding reasonableness, ironically at least one business respondent was clearly in favour of the fines. The respondent stated that:

paying a fine remains a deterrent that environmental supervisors/ managers/ departments can use against management when they sometimes query whether a licence is required or if they must wait for a licence to be issued prior to the engagement of their activities.

Another noted that: "We broke the law, we had to pay". These comments suggest a high degree of conscientiousness towards legislative obligations. Others, however, made comments which suggest that they expect the facts of their situation to be considered. These include comments such as: "Too high a fine for the size of the company turnover" (sic) and "The activity was posing a safety risk and had to be closed". The 50-50 split in views regarding whether fines are fair are also an aspect worth noting as a perception that the legislative system is credible is a contributor to compliant, or non-compliant, behaviour. However, the reasons why respondents indicated dissatisfaction differed. Some felt that the fines needed to be significant as illustrated by the following comments –

"It can be higher to prevent abuse".

"All these fines were imposed some time ago and before the Regulations prescribing the process for determination of these fines, they may have been argued to be too lenient at the time".

"If the fine is not set at a significant amount, companies will probably consider it a small price to pay if projects can stay on track and not be delayed as a result of permits not being issued on time. The trade-off for fines is less than

R1 mil against a project with a NPV of more than R500 mil is probably still considered to be acceptable".

By contrast others felt that mitigation factors had not been taken into account as are illustrated by the following remarks –

"Unfair as all processes were followed with another department"

"...[name of department omitted] does not listen to reason. They also does not understand safety risks associated with some of the activities. If our case closing the activity had no negative environmental impact but huge safety concerns however they don't understand safety in the workplace". (sic)

These responses again illustrate that fines do not have a one-size-fits all impact.

6.3 Knowledge and prosecution

Knowledge was also tested in relation to the contentious issue regarding whether prosecution is permissible when a person has made a section 24G application. It will be recalled that NEMA was amended in 2013 to make it clear that prosecution may take place even if a section 24G application has been made. In some jurisdictions prosecutors were willing to take on these cases even before NEMA was amended or before the amendment came into force.⁵⁵ In others they were not and during the interviews with officials, some reported that certain prosecutors remain reluctant to prosecute.⁵⁶

Respondents' understanding of the position was tested by presenting them with the statement: "I can't be prosecuted if I have paid a fine in terms of section 24G" and asking them to indicate whether they agreed or disagreed with the statement, or did not know.

In the business survey, of the 85 who responded, 38.82 per cent of respondents agreed with the statement with 14.12 per cent indicating that they did not know. As with the question on the maximum fine, when these two results are considered together they show that just over half of business respondents do not understand the consequences of starting an activity unlawfully because of gaps in their knowledge. Although the percentages were less in the consultants' responses - 24.43 per cent agreed and 10.34

⁵⁵ See the plea and sentence agreement in *S v Mellville* Kirkwood District Magistrates' Court, Case number: A 513/09, 18 October 2010 and *S v Nokomati Anthracite (Pty) Ltd* Nelspruit Regional Court, Case No: SH 412/13, 28 August 2013 which note the accused's s 24G application as being a mitigating factor. *S v UNICA Iron Steel (Pty) Ltd* (Temba, Hammanskraal) (unreported) case number 386/12/2013 (undated) was concluded shortly after the amendment. See Murombo and Munyuki *PER* 2019 (22) for a discussion of these plea and sentence agreements.

⁵⁶ It remains to be seen whether the Uzani judgment influences these views.

per cent indicated they did not know – it shows that more than a third of consultants are likely to advise their clients incorrectly because of limitations in their knowledge. Suggestions that incorrect understandings of law occur in practice were indicated in other responses which respondents volunteered. For example, in response to a subsequent question which asked why respondents had applied in terms of section 24G, one respondent indicated that: "We started operating waste & recycling activities before the new NEMA act was implemented" (sic). This suggests either that the respondent did not understand the process, or that the consultant did not know that the EIA Regulations do not operate retrospectively and that no application was required.

6.4 Knowledge and approval of applications and directives

Two further questions related to knowledge yielded higher levels of correct responses. In the first question respondents were asked if an environmental department must always grant an application in terms of section 24G. The purpose of this question was to test whether the respondents' views supported the perception that section 24G is abused because authorisation is "guaranteed". The majority of the 84 business respondents – 71.43 per cent – correctly disagreed with the statement. In the consultant's survey an even bigger majority - 87.50 per cent - disagreed with the statement. The perception that there is a reduced risk of applying for authorisation in terms of section 24G compared to the routine application process is therefore not borne out by the surveys. Ironically, the interviews with government officials indicated that section 24G applications are seldom refused which seems to give some credence to the view that unintended opportunities are presented by section 24G. However, when questioned further, most officials reported that the number of approvals and refusals is similar to those related to normal EIA applications which suggests that there is no advantage in applying in terms of section 24G.

In the second question respondents were asked if they agreed or disagreed with the statement that: "An environmental department can order an organisation to stop operating while its section 24G application is being processed". The authority which section 24G(1) gives in this respect ought to be a deterrent where it is known as its use can negate any perceived or actual advantage that applicants gain by commencing their activity unlawfully. In this regard, one department reported that they order applicants to cease their activities during the application process as a matter of routine.

Correct responses were high with 64.94 per cent of business representatives and 94.40 per cent of consultants agreeing with the statement. The accuracy of this knowledge perhaps militates against some

of the opinions that many people view section 24G as an effective alternate to following the routine application process.

7 Preliminary observations

The importance of EIAs as a tool for giving effect to the environmental right was noted earlier. It is critical that section 24G is not viewed or used as a mechanism to undermine the proactive and participatory EIA approach. One way in which such views can be prevented from taking root is to make sure that the process is not regarded as an ordinary application and that the consequences of using it in terms of administrative and criminal penalties are understood. The results of the study regarding the number of annual applications and the extent to which the regulated community and their advisors have knowledge about section 24G yield a number of insights.

Regarding the number of applications, the quantitative analysis raises queries regarding the accuracy of the data. Although this means that findings cannot be regarded as being definitive, the results do suggest two observations. First, the number of annual applications is approximately 90 on average which represents 2.5 to 5 per cent of the number of routine EIA applications. This does not suggest widespread abuse of the section 24G process, particularly if it is borne in mind that some applications are made in response to inadvertent non-compliance such as situations where the applicant purchased a development which the previous owner had not obtained authorisation for, or the applicant was genuinely ignorant of the requirement to obtain authorisation. Secondly, the number of annual applications are relatively consistent. This means that perceptions that there is a downward trend in applications are not borne out. It also suggests that there is no creeping increase in the number of people who deliberately choose to start an activity in non-compliance because of the perceived benefits of following the section 24G process.

Observations can also be made in respect of the responses to questions on awareness and knowledge. The results show that awareness levels are relatively high, despite the departments not actively engaging in awareness raising campaigns. Levels of more nuanced knowledge, however, were uneven with high levels of accuracy being indicated for some questions and low levels for others. In some instances low levels of knowledge may have an effect on undermining deterrence, an example being the number of respondents who are unaware of the potential for prosecution to be initiated, even if a fine has been paid.⁵⁷ In other instances reduced levels of knowledge may not, ironically, constitute a barrier to compliance and may

⁵⁷ The extent to which there is a relationship between inaccurate or no knowledge and non-compliance is discussed further in Part II in the context of responses to other questions which explore deterrence.

even enhance it. In this regard, the amendment of section 24G to increase the administrative fine was intended to be a deterrent. The results militated against this potential deterrence effect being realised, including the fact that government seldom utilises its power to impose fines that are anywhere close to the maximum; levels of knowledge about the maximum fine amongst both business and consultants are relatively low; and approximately half of business indicated that the fines were affordable. Notwithstanding this, other results suggest that the imposition of a fine has an effect. This is demonstrated by the number of comments which were volunteered regarding the implications of paying a fine where respondents made it clear that paying a fine feels both punitive and uncomfortable.

By contrast to observations which can be made where there are low or inaccurate levels of knowledge, the results where there are high levels of accuracy are also relevant. These occurred in responses to questions about whether authorisation is guaranteed and whether the authority is entitled to instruct the applicant to cease the activity pending the finalisation of the application process. These two questions speak to views that there are unintended benefits of following the section 24G process and that people perceive section 24G as a beneficial option for obtaining authorisation. The results likely suggest that, to the extent that some applicants do hold these views, it is either not widespread or that there is an awareness of the risk that is involved in following the section 24G route.

The observations also point to considerations which have a bearing on the introduction of an administrative penalty system in South African environmental legislation. Some are institutional in nature i.e. the need to ensure the accurate collection and dissemination of information which can be used to track the effectiveness and impact of an administrative penalty system. However, key amongst the considerations, are responses to the quantum of the fine. Some responses highlight the fact that the burden and impact that a fine has on the recipient varies according to the circumstances of the transgressor. This suggests that decisions regarding the nature of administrative fines require careful thought. Fixed penalty fines may be appropriate for lesser offences, such as littering, where the quantum of the fine would be low. However, adopting fixed penalty fines with hefty amounts that range from hundreds of thousands to millions of rands for more significant offences, poses a danger of the fine creating undue social hardship whilst at the same time having no clear nexus to the scale of the environmental impact which occurred or the motivation of the transgressor. The potential for this risk to manifest where the administrative penalty system is extended to other environmental crimes such as biodiversity-related ones is also present. As an example, during the study an official shared an anecdotal account of a person who had been convicted for poaching. The court imposed a nominal fine or imprisonment for a few

months. The offender elected to serve the time in prison. He explained to the official that this was because he would be guaranteed of three meals a day. Hefty fixed penalties in these situations are therefore arguably meaningless where the recipient has no ability to pay and detract from the credibility of the authority. Moreover, they could inadvertently result in formal government policy being anti-poor in many situations and therefore contrary to the requirements of sustainable development which is enshrined in the constitutional environmental right.

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Abbreviations

CER	Centre for Environmental Rights
CONNEPP	Consultative National Environmental Policy Process
DEA	Department of Environmental Affairs
EIA	environmental impact assessment
EMI	environmental management inspector
NEMA	National Environmental Management Act 107 of 1998
Waste Act	National Environmental Management: Waste Act 59 of 2008
Air Quality Act	National Environmental Management: Air Quality Act 39 of 2004